Supreme Court, U.S.
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No. 99-65

In The

Supreme Court of the United States

MARCUS B. FELDMAN,

Petitioner,

v.

CHUNG-WU HO and BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit properly balanced Feldman's interest in his speech at issue against SIU's interests in effectively and efficiently achieving its goals as a public employer and educational institution, consistent with the First Amendment standards set forth by this Court in *Waters v. Churchill*, 511 U.S. 661 (1994) and *Pickering v. Board of Education*, 391 U.S. 563 (1968).

LIST OF PARTIES

This action was filed by Petitioner Marcus B. Feldman ("Feldman") against his former employer Respondent the members of the Board of Trustees of Southern Illinois University in their official capacities only ("SIU") and Chung-Wu Ho, the former chair of Feldman's Mathematics Department at SIU, ("Ho"). SIU is a body politic and corporate and, an arm of the State of Illinois. 110 ILCS § 520/1, *et seq.*; *Cannon v. University of Health Sciences/Chicago Medical School*, 710 F.2d 351, 356-57 (7th Cir. 1993).

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OPINIONS BELOW

In addition to the opinion of the Seventh Circuit Court of Appeals reported at 171 F.3d 494 (7th Cir. 1999), (A. at 1-9) and the unreported opinion of the district court (A. at 10-19), the decision of the Seventh Circuit Court of Appeals in an earlier related case is reported at *Feldman v. Bahn*, 12 F.3d 730 (7th Cir. 1993), *cert. denied*, 513 U.S. 1014 (1994).[1]

STATEMENT OF THE CASE

A. Factual Background

1. Feldman's Speech

Feldman began his employment with SIU as a non-tenured assistant professor in the Department of Mathematics and Statistics (the "Mathematics Department") in the fall of the 1986-87 academic year. (1/28/97, T.112-113 [Feldman]). Feldman's speech at issue involved one of his

[1] Citations to the Appendix attached to Feldman's Petition are referenced by "A." with a page number. Citations to documents in the record below are by abbreviated description, and the district court docket number designated "D. No." The transcripts of the jury trial are part of the record on appeal at D. Nos. 74-81. Citations to the trial transcripts are referenced as "[date of transcript] T. [Page No.] [identity of witness testifying]." Feldman's exhibits introduced at trial are referenced "PX.___," and SIU's and Ho's trial exhibits are referenced "DX.___."

colleagues in the Mathematics Department, Dr. Ursala Ledzewicz-Kowalewska ("Ledzewicz").[2]

In April of 1989, during the consideration of Ledzewicz for promotion with tenure, Feldman told Ho that he suspected that Ledzewicz had misrepresented her past collaboration with a mathematics professor at Louisiana State University (Dr. Altman) where she had taught prior to accepting a job at SIU. Feldman told Ho that at a book fair over a year earlier in Atlanta in January of 1988, Feldman reviewed a book which had been published in 1986 by Altman, and there was no mention of or attribution to Ledzewicz. Feldman told Ho that he had asked Ledzewicz whether this was the book on which she had collaborated with Altman. He reported that Ledzewicz answered affirmatively and told him that Altman had stolen her work. Feldman claimed that, at the time, he had decided to give her the benefit of the doubt, but felt obligated by SIU's academic honesty policy to report his concerns to Ho about the accuracy of Ledzewicz's representations of her collaborative efforts with Altman when asked to comment on her tenure application. (DX.31; 1/28/97, T.137-38 [Feldman]; 1/29/97, T.3-4 [Feldman];

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[2] Ledzewicz had taught in Lodz, Poland, from 1979 through 1986. She came to the United States and accepted a visiting assistant professor position with Louisiana State University from August of 1986 through May of 1987. She accepted an assistant professor position at SIU in the Department commencing September of 1987. Her initial appointment made her eligible for early tenure consideration during the 1988-89 academic year. (DX.39; 2/4/97, T.161, 178, 183-84 [Ledzewicz]).

1/30/97, T.15-21 [Ho]; 2/4/97, T.50-52 [Ho]; 2/4/97, T.192-93 [Ledzewicz]).

Ho first attempted to contact Altman, unsuccessfully. Ho then asked Ledzewicz about Feldman's allegations. Ledzewicz denied Feldman's accusations. She told Ho that she never told Feldman that Altman stole her work or that she collaborated with Altman on the book published in 1986. Moreover, Ledzewicz pointed out to Ho that Feldman's accusation made no sense because Ledzewicz had not even moved to the United States from Poland at the time the book Feldman was referencing was written, and she had only collaborated with Altman while she was employed at LSU after she came to the United States. Thus, as she had not worked with Altman prior to the publication of the book in question (1986), it would have been impossible for him to have stolen her work. Ho independently verified that the book was written before Ledzewicz moved to the United States. Ho concluded that Feldman was mistaken in his suspicions and conducted no further investigation. (1/30/97, T.21-27, 137-138 [Ho]; 2/4/97, T.51-53 [Ho]; 2/29/97, T.4 [Feldman]; 2/4/97, T.190-193 [Ledzewicz]; 2/6/97, T.55-56 [Ledzewicz]).

Feldman discussed his negative opinions about Ledzewicz with other faculty members in the department as well. When polled on Ledzewicz's tenure application, Feldman voted no on the stated basis of questions and concerns raised regarding her tenure by several faculty

members and the criteria for tenure. (PX.21; 1/29/97, T. 7-9 [Feldman]).[3]

After Feldman's complaints about Ledzewicz, Feldman and Ledzewicz had several confrontations. On May 11, 1989, Feldman took a printout from a word processor and copied a portion of a draft of an article being prepared by Ledzewicz *without* Ledzewicz's permission or knowledge. Ledzewicz complained to Ho. Feldman claimed he made the copy because he was interested in the topic of the paper and planned to talk to Ledzewicz about it. Ho placed a memo in Feldman's file regarding the incident. At Ho's insistence, Feldman apologized in writing to Ledzewicz. Ledzewicz did not accept Feldman's apology. (DXs.62, 63; 1/29/97, T.6, 14-15 [Feldman]; 2/4/97, T.170-180 [Ledzewicz]; 2/4/97, T.44-45, 69-70 [Ho]). On May 15, 1989, a grade sheet from one of Ledzewicz's classes was missing from the department's file. Feldman admitted to Ho that he had taken the grade sheet (again contrary to department policy), but claimed that he had returned it. The grade sheet was never found. (DX.14; 2/14/97, T.70-71 [Ho]).

As a result of the concerns expressed by some of her colleagues, Ledzewicz decided to withdraw her tenure application in the spring of 1989. She was upset about

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[3] In May of 1990, Feldman later advised Ho that he accepted Ho's investigation of Ledzewicz's representations and considered the matter closed. Feldman expressed his opinion that his relationship with Ledzewicz had improved. Ledzewicz did not agree with Feldman's view of their relationship. (1/29/97, T.95-96 [Feldman]; 2/4/97, T.170-180 [Ledzewicz]).

issues her colleagues had raised about her without speaking with her. She urged her colleagues to talk to her about any questions they had. She also offered her explanation about her work with Altman. The following year (1989), Ledzewicz was favorably considered for promotion with tenure to associate professor, prior to the adverse vote on the continuation of Feldman's non-tenured appointment. (DX.30; 2/4/97, T.175-178 [Ledzewicz]; 2/6/97, T.84-85 [Ledzewicz]; 1/30/97, T.26-27, 72-75 [Ho]; 2/4/97, T.54 [Ho]).

2. Feldman's Non-Tenured Appointment Is Not Renewed

The Promotion and Tenure Committee (PT Committee) met to review the performances of the Mathematics Department's non-tenured faculty (including Feldman) on December 11, 1989 and January 30, 1990. As Department Chair, Ho was an *ex officio* member of the PT committee without vote except in cases of ties. The December 11, 1989 meeting was a preliminary meeting to discuss the procedures that would be followed in reviewing non-tenured faculty. At the December 1989 meeting, one of the voting members first suggested that Feldman be issued a terminal contract. When asked for his initial thoughts as to this suggestion, Ho expressed his opinion that Feldman's contract should be renewed and that the issue of nonrenewal could be tabled until Feldman was up for tenure review. No decision regarding Feldman was reached at the December 1989 meeting. (PX.194; DX.46; 2/4/97, T.53-60 [Ho]; 2/6/97, T.111-12 [Phillips]; 2/3/97, T.21 [Steinberg]; 2/6/97, T.153-55 [Steinberg]; 2/3/97, T.160-61 [Cooper]).

At the January 30, 1990 PT Committee meeting, a secret ballot was conducted on the renewal of each non-tenured faculty member's contract. The PT Committee voted to recommend to Ho that Feldman's contract not be renewed. The vote was four (4) in favor of nonrenewal, two (2) opposed. Feldman's discussions about whether Ledzewicz had misrepresented her credentials in terms of her prior collaboration with Dr. Altman were not a topic of discussion among the PT Committee members and, according to the testimony of Committee members, formed no basis for any member's vote not to renew Feldman's contract. (DX.3; 2/6/97, T.112-13 [Phillips]; 2/4/97, T.61, 96 [Ho]; 1/30/97, T.91-92 [Garder]; 2/3/97 T.216 [Cooper]; 2/3/97 T.58, 93 [Steinberg]).

Ho reviewed and considered the PT Committee recommendation. On February 15, 1990, Ho recommended to Dean Myer that Feldman's contract not be renewed (*i.e.*, that it would terminate in June 1991). Ho's expressed reasons for his concurrence with the PT Committee's recommendation included his view that Feldman had serious problems in both teaching[4] and service.[5] Dr. Ho

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[4] Feldman's performance in teaching was evaluated by the tenured faculty of the Department as inadequate; only two (2) of the eight (8) tenured faculty in the Department rated Feldman's teaching "satisfactory." (DX.26; 2/3/97, T.45-47 [Steinberg]). This inadequacy was also confirmed by his peer classroom evaluations, student complaints and student evaluations. (DXs. 139, 140; PXs.136, 137, 138; 1/28/97, T.163-167 [Feldman]; 1/29/97, T.22-24 [Feldman]; 1/30/97, T.139-140; 2/6/97, T.114-115, 118-121, 129-134 [Phillips]).

[5] Many faculty members perceived that Feldman was not performing satisfactory service to the Department. Ho testified that Feldman had a poor record in his role as a recruiter of

also observed that Feldman had serious personal and professional compatibility problems with his colleagues (including Ledzewicz) impacting the effective operation of the Department.[6] Ho also testified that he did not consider Feldman's speech about the accuracy of Ledzewicz's representations about her prior collaborations with Altman. (DX.3; 2/4/97, T.61-73 [Ho]).

Feldman requested the PT Committee and Ho to reconsider the negative recommendation. (2/4/97, T.81-85 [Ho]; 2/6/97, T.160-167 [Steinberg]). The results of the reconsideration vote were four (4) persons in favor of issuing a terminal contract to Feldman, one (1) person opposed and one (1) abstention. (DX.7, 21; 1/30/97, T.180 [Ho]; 2/3/97, T.216 [Cooper]; 2/4/97, T.94-95 [Ho]; 2/6/97, T.166-167 [Steinberg]).

On May 15, 1990, Ho again recommended to the Dean that Feldman be issued a terminal contract. In June of 1990, the Dean adopted the recommendations of Ho

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outside speakers. In the preceding year, Feldman did not show up for ten (10) out of seventeen (17) talks given by invited speakers. Also, he did not send out announcements for one of the speakers, causing Ho to take over this task and costing the Department money because the lateness in mailing forced them to send the announcements first class rather than bulk mail. Further, Feldman twice refused Ho's requests to serve on committees. (2/4/97, T.66-69 [Ho]).

[6] Ho advised Feldman on many occasions about his teaching methods. On some of these occasions, Feldman would get angry and argue with Ho. Feldman also had disagreements with at least six other faculty members, both tenured and nontenured alike, including former Department Head Pendergrass. (2/4/97, T.33-34, 73, 76, 78-80 [Ho]; 2/3/97, T.42-43 [Steinberg]).

and the PT Committee and informed Feldman that he would be issued a terminal contract for the 1990-91 academic year and that his contract would expire on June 15, 1991. (DXs.22-23; 2/4/97, T.94-96 [Ho]; 1/29/97, T.145-46 [Feldman]).

B. Procedural Background

1. Feldman's Prior Related First Amendment Case

This action is a consolidation of claims asserted in two earlier suits filed by Feldman in state and federal court. Feldman had filed an earlier suit against the members of the Board of Trustees of Southern Illinois University and various SIU administrators (including Ho), in their individual and official capacities in the United States District Court for the Southern District of Illinois, alleging that his contract was not renewed due to his alleged protected speech (an alleged accusation of plagiarism against a colleague) in violation of the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. On an interlocutory appeal, the Seventh Circuit held that some of the individual defendants (including Ho) were entitled to qualified immunity from damages on the First Amendment claim because they had not violated clearly established constitutional law. *Feldman v. Bahn*, 12 F. 3d 730 (7th Cir. 1993), *cert. denied*, 513 U.S. 1014 (1994).

2. Feldman's State Court and District Court Proceedings

On February 11, 1992, Feldman had initially filed suit against Ho individually in the Madison County Circuit Court of Illinois alleging that Ho tortiously interfered with his contract with SIU in violation of state law. On or about May 18, 1995, Feldman was granted leave in that state court action to file an amended complaint to consolidate his federal claims against SIU with his pending state law tort claims against Ho individually. On June 1, 1995, SIU removed Feldman's state law action to federal court. The removed case is the district court case which is the subject of the appeal at issue herein. (Notice of Removal D. No. 1).

In January and February 1997, a jury trial was held. (Trial Transcripts, D. Nos. 74-81). On February 7, 1997, the jury entered verdicts in favor of Feldman against SIU on his First Amendment claim and against Department Chair Ho on his state law tortious interference with contract claim, and assessed $203,918.19 in compensatory damages and $50,000 in punitive damages against Ho individually. (Jury Verdicts, D. Nos. 82-83). On August 5, 1997, the district court entered an order granting Feldman's motion for attorneys' fees and denying Feldman's request for back pay, reinstatement and front pay. (Memorandum and Order, D. No. 101). On August 6, 1997, the district court entered judgment against Ho individually for past earnings in the amount of $203,918.19 and for punitive damages in the amount of $50,000, ordered SIU to pay Feldman $186,105.75 in attorneys' fees (which included a $50,000 bonus) and denied Feldman's requests

for back pay, reinstatement, front pay and additional attorneys' fees. (Judgment, D. No. 102).

On August 18, 1997, SIU and Ho moved for judgment as a matter of law, for amendment of the judgment or for a new trial. (Motion, D. No. 106). On August 19, 1997, Feldman moved to amend the judgment and to make additional findings. (Motion, D. No. 107). On November 24, 1997, the district court denied SIU's, Ho's and Feldman's post-trial motions. (Memorandum and Order, D. No. 111). On December 27, 1997, SIU and Ho timely filed a Notice of Appeal. (Notice of Appeal, D. No. 114). On January 5, 1998, Feldman timely filed a Notice of Cross-Appeal. (Notice of Cross-Appeal, D. No. 116).

3. The Seventh Circuit's Decision

a. The First Amendment Claim Against SIU

On March 22, 1999, the Seventh Circuit reversed the judgments against SIU and Ho, and remanded the case with instructions to enter judgment on the merits for SIU and Ho, without prejudice to Feldman's ability to file suit against the State of Illinois in the State's Court of Claims. *Feldman v. Ho*, 171 F.3d 494, 498 (7th Cir. 1999) (A. at 9). Preliminarily, the Seventh Circuit noted that when the original litigation began, Feldman's theory was that Ho had protected another colleague against Feldman's charge of plagiarism, by giving the accused colleague tenure while seeing to it that Feldman departed. *Id.* at 495 (A. at 1-2, citing *Feldman v. Bahn, supra.*). The Seventh Circuit observed that Feldman then recast his theory. In the new telling, Feldman had accused another colleague of trying to improve her standing by claiming falsely that

she had written a paper jointly with a famous mathematician, the accused member of the faculty denied the charge, Ho took her side and Feldman was given a terminal contract as a result. *Id.* (A. at 2).

Given the jury's verdict, the Seventh Circuit acknowledged that it must assume that Ho reacted adversely to Feldman's accusation against his colleague and that this led the University to end Feldman's employment. The Seventh Circuit also assumed that the academic conduct (or misconduct) of teachers at a State university is an issue of public importance rather than just of private interest to the persons involved. *Id.* (A. at 2-3). However, the Seventh Circuit concluded that it did not necessarily follow that a jury rather than the faculty determines whether Feldman's accusation was correct. *Id.* (A. at 3). The Seventh Circuit then proceeded to analyze and balance SIU's interests against Feldman's interests in his speech at issue herein.

The Seventh Circuit weighed heavily the University's constitutionally protected academic independence, which included the ability to choose its faculty on academic grounds. *Id.* at 495 (A. at 3). The Court noted that speech lies at the core of scholarship and that every academic decision in the end is a decision about speech; yet the Constitution does not commit to decision by a jury every speech-related dispute. *Id.* at 496 (A. at 3). Quoting from its earlier decision, the Seventh Circuit explained:

> Teachers . . . speak and write for a living and are eager to protect both public and private interests in freedom to stake out controversial positions. Yet they also *evaluate* speech for a living and are eager to protect both public and private

> interests in the ability to judge the speech of others and react adversely to some. They grade their students' papers and performance in class. They edit journals, which reject scholarly papers of poor quality. They evaluate their colleagues' academic writing, and they deny continuing employment to professors whose speech does not meet their institution's standards of quality. "The government" as an abstraction could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, but a Department of Political Science can and should show such a person the door – and a public university may sack a professor of chemistry who insists on instructing his students in moral philosophy or publishes only romance novels. Each university evaluates *and acts* on the basis of speech by members of the faculty; indeed, Feldman proposed that Ho do just this on the basis of his colleague's speech . . . Feldman . . . does not deny that speech in a university may be the basis of adverse action; he believes, rather, that the penalty should have fallen on the accused colleague rather than himself. Yet an unsupported charge of [academic misconduct] reflects poorly on the accuser; the first amendment does not ensure that a faculty member whose assessment of a colleague's work reveals bad judgment will escape the consequences of that revelation.

Id. (A. at 3-4, quoting *Feldman v. Bahn*, 12 F.3d at 732-33 (emphasis in original; internal citations omitted)).

The Seventh Circuit went on to analyze when speech was a legitimate ground of decision in employment.

Using political patronage cases as an example, the Seventh Circuit pointed out that the question is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* (A. at 5). The Seventh Circuit concluded that principle is not limited to political affiliation. "[T]he question is whether the hiring authority can demonstrate that [speech] is an appropriate requirement for the effective performance of the public office involved." *Id.* (A. at 5, quoting *Waters v. Churchill*, 511 U.S. 661, 671-75 (1994)). "The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate." *Id.* at 496-497 (A. at 5, quoting *Waters*, 511 U.S. at 675).

Analyzing how these principles apply to academic decisions, the Seventh Circuit noted that one goal of universities is to seek to accumulate and disseminate knowledge. To function well (*i.e.*, effectively and efficiently) in this regard, a university must be able to decide which members of its faculty are productive scholars and which are not (or, worse, are distracting those who are). *Id.* at 497 (A. at 6). The Seventh Circuit observed that an unsubstantiated charge of academic misconduct not only squanders the time of other faculty members (who must analyze the charge, or defend against it), but also reflects poorly on the judgment of the accuser. *Id.* (A. at 6). The

Seventh Circuit concluded that a university is entitled to decide for itself whether the charge of academic misconduct is sound. To do otherwise, the Seventh Circuit noted, would undermine the University's mission – which includes the ability to decide such academic questions. The Court opined that transferring that decision to a jury in the name of the First Amendment would be committing an academic decision to amateurs, querying "is a jury really the best institution to determine who should receive credit for a paper in mathematics?" *Id.* (A. at 6). The Court also observed that creating the possibility of a substantial damages award if a jury later disagreed with the faculty's resolution of a charge regarding academic misconduct could discourage universities from acting to improve their faculty. *Id.* (A. at 6).

The Seventh Circuit acknowledged that a public employer's entitlement to consider speech under *Waters* is "limited to the kind of speech that is part of the employer's mission." *Id.* (A. at 7). The Seventh Circuit observed that hard cases as to whether a university could consider speech included those cases where the speech at issue was given off campus or involved speech unrelated to the employee's job or to the mission of the employer. *Id.* (A. at 6). In such cases, the Seventh Circuit observed that the speech would be likely protected, unless it proved excessively disruptive to the employer's mission and then the employer may respond. *Id.* (A. at 7).

The Seventh Circuit then applied these principles to the balance of Feldman's interest in his speech at issue here against SIU's interests as articulated above. The Seventh Circuit concluded that this case was easy; the balance tipped in favor of SIU. *Id.* at 497-498 (A. at 6-7).

The Court observed that Feldman's speech was neither unrelated to his job (as would be the case of supporting a democrat for governor), nor unrelated to mathematics (as would be the case of charging the university president with fiscal improprieties). Nor, observed the Seventh Circuit, was the speech concerned with the rules by which academic departments at Southern Illinois University evaluate charges of scholarly misconduct. *Id.* at 497 (A. at 7). To the contrary, Feldman had charged a colleague with academic misconduct. The University investigated the charge, vindicated the colleague and later concluded that it could obtain better mathematicians than Feldman for its faculty. *Id.* (A. at 6). As such, Feldman objected to the way the Mathematics Department handled its core business of choosing and promoting scholars. *Id.* (A. at 7). The Seventh Circuit concluded that the task of choosing and promoting scholars, while inevitably concerned with speech, was so central to a university's mission that SIU's role as employer dominated. *Id.* at 497-498 (A. at 7). The Seventh Circuit thereby concluded that the balance of interests tipped in favor of SIU, and SIU was entitled to judgment in its favor as a matter of law. *Id.* (A. at 7).

b. The State Law Tortious Interference Claim Against Ho

The Seventh Circuit also concluded that Feldman's claim against Ho personally under a State law theory of tortious interference with contract was equally untenable as a matter of law. The Court found merit in Ho's jurisdictional defense: that the state law claim was a suit against the State, and thus foreclosed in federal court by

the Eleventh Amendment to the United States Constitution. *Id.* at 498 (A. at 8-9). The Seventh Circuit noted that it had already held in 1993 that Ho had immunity against any claim resting on the First Amendment. *Id.* at 498 (A. at 9, referencing *Feldman v. Bahn, supra.*) The Seventh Circuit also held that, as Ho had acted within the scope of his employment as Department Head with respect to his recommendation regarding Feldman, Illinois law also granted Ho immunity from suit in his individual capacity. Therefore, the Seventh Circuit concluded that Ho was also entitled to judgment in his favor without prejudice to any right Feldman may have against the State of Illinois in the Court of Claims. *Id.* (A. at 9).

4. Subsequent Proceedings

On April 16, 1999, the Seventh Circuit denied Feldman's motion for reconsideration filed April 5, 1999. (Order and motion). On July 8, 1999, Feldman filed the instant petition for a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Feldman's Petition Misstates the Seventh Circuit's Decision; the Seventh Circuit Properly Applied the Balancing of Interests Test Consistent With This Court's Decisions in *Waters* and *Pickering*

Feldman's petition misstates the Seventh Circuit's decision. Feldman's counsel's interpretative comments are interspersed amongst quotes from the decision. (Pet. at 3-4). Feldman erroneously asserts that the Seventh

Circuit carved out some special rule for public universities which exempted them from liability in the First Amendment context. (Pet. at 4). To the contrary, the Seventh Circuit analyzed and applied the established balancing of interests test to the parties' interests presented here, consistent with this Court's decisions in *Waters* and *Pickering*.

The law is clear that a government employee's speech will be protected where it is on a matter of public concern and where the employee's interest in expressing herself on the matter is not outweighed by any injury the speech could cause "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Waters*, 511 U.S. at 668 (citing *Connick v. Myers*, 461 U.S. 138, 142 (1983) and *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)).

Given the jury's verdict, the Seventh Circuit concluded that it must assume that Ho reacted adversely to Feldman's accusation against his colleague and that this led SIU to end Feldman's employment. *Feldman v. Ho*, 171 F.3d at 495 (A. at 2). The Seventh Circuit further assumed that academic conduct (or misconduct) of teachers at a state university is an issue of public importance rather than just a private interest to the persons involved. *Id.* (A. at 2).[7] In light of these assumptions, the Seventh Circuit

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[7] Other courts have held that criticism of another faculty member's work was *not* speech on a matter of public concern. *See, e.g., Williams v. Alabama State University*, 102 F.3d 1179 (11th Cir. 1997) (faculty member's speech criticizing the quality and use of a grammar testbook written by an administrator and

went on to properly analyze and apply the issue it deemed was properly before it – the proper balancing of Feldman's interest in his speech on the matter at issue here against SIU's interest in promoting the efficiency of the public services it performs through its employees as a public university.

The law is clear that if the court concludes that a public employee's speech touches on a matter of public concern, the court must then "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the state's interest, as an employer, in promoting the efficiency of the public services it performs." *Pickering*, 391 U.S. at 568. It is also established that, although the balancing issue is closely tied to the specific facts of the case, the proper balance is a question of law for the court to determine. *Connick*, 461 U.S. at 150. A number of factors are relevant to the balance. For example, courts must consider the

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various faculty members held not to involve a matter of public concern triggering First Amendment protection); *Ballard v. Blount*, 581 F. Supp. 160, 163 (N.D. Ga. 1983), *aff'd*, 734 F.2d 1480 (11th Cir.), *cert. denied*, 469 U.S. 1086 (1984) (a professor's criticism of a required course syllabus was held not to be a matter of public concern); *Harris v. Merwin*, 901 F. Supp. 509, 512 (N.D. N.Y. 1995) (a faculty member's expression of his concerns to the administration of a public university about a colleague's supposed lack of qualification for the job to which he was appointed simply did not implicate matters of public concern); *Harris v. Arizona Board of Regents*, 528 F. Supp. 987, 999 (D. Ariz. at 1981) (a professor's opposition to the qualifications of a black external candidate for an assistant professor position was an internal matter not of public concern and fell outside the scope of protected speech).

employer's need to maintain harmony among co-workers, to curtail conduct which impedes the proper and competent performance of daily duties and/or to encourage close and personal relationships between the employee and his superiors and co-workers, particularly where those relationships call for loyalty and confidence. *Breuer v. Hart*, 909 F.2d 1035, 1039-40 (7th Cir. 1990). "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *McMurphy v. City of Flushing*, 802 F.2d 191, 198 (6th Cir. 1986). "The public employer is not required to wait until . . . working relationships actually disintegrate if immediate action might prevent such disintegration." *Breuer*, 909 F.2d at 1039-40. The level of public interest suggested by the employee's speech, and the time, manner and place in which the speech took place are relevant to the *Pickering* balance as well. *Id.*

As to Feldman's interest in his speech, the Seventh Circuit observed that his speech was not unrelated to his job (as would be the case of supporting a democrat for governor), nor was it unrelated to mathematics (as would be the case of charging the university president with fiscal improprieties). Nor did Feldman address the rules by which academic departments at SIU evaluated charges of scholarly misconduct. *Feldman v. Ho*, 171 F.3d at 497 (A. at 7). So the level of public interest suggested by Feldman's speech, and the time, manner and place in which the speech took place, did not weigh heavily on Feldman's side of the balance. To the contrary, Feldman's speech related to how the Mathematics Department handled its core business of choosing and promoting

scholars. Feldman asserted an unsubstantiated charge of academic misconduct against a colleague during a tenure consideration process, which the colleague denied. SIU investigated the charge and vindicated the colleague. SIU tenured the colleague. SIU also concluded that it could obtain better mathematicians than Feldman for its faculty. *Id.* at 495, 497-498 (A. at 1-2, 6-7).

Acknowledging that a public employer's entitlement to consider speech under *Waters* is limited to the kind of speech that is part of the employer's mission, the Seventh Circuit concluded that Feldman's speech was so central to SIU's mission, that SIU's role as employer dominated over Feldman's interest in the particular speech at issue here. *Id.* at 497-498 (A. at 7). As the Seventh Circuit observed, for a university to function well in its mission of accumulating and disseminating knowledge, it must be able to decide which members of its faculty are productive scholars and which are not. *Id.* at 497 (A. at 6).

In analyzing the balancing issue presented here, the Seventh Circuit also properly concluded that the question of whether Feldman's colleague had overstated her credentials was better suited for resolution by SIU's faculty. "A university is entitled to decide for itself whether the charge is sound; transferring that decision to the jury in the name of the First Amendment would undermine the university's mission." *Id.* (A. at 6). The Court opined that transferring that decision to a jury in the name of the First Amendment would be committing an academic decision to amateurs, querying "is a jury really the best institution to determine who should receive credit for a paper in mathematics?" *Id.* (A. at 6).

The Seventh Circuit's reasoning in this regard is consistent with this Court's analysis of an analogous issue in *Waters*. In *Waters*, this Court recognized that employers rely on numerous factors in making employment decisions, including hearsay, past similar conduct, personal knowledge of individual credibility and other factors which the judicial process ignores. *Waters*, 511 U.S. at 676. "Such reliance may sometimes be the most effective way for the employer to avoid the recurrence of improper or disruptive conduct." *Id.* Government employers should be allowed to use personnel procedures which differ from the evidentiary rules which courts use, without fear that these differences will lead to liability. *Id.* at 676-677. Employers are free to make reasonable employment decisions, and are not confined by the rules of judicial process in doing so. *Id.* Likewise, the Seventh Circuit properly concluded SIU could determine the issue presented regarding Feldman's colleague's credentials.

Contrary to Feldman's assertions, nothing about the Seventh Circuit's analysis herein created a *per se* rule exempting universities from First Amendment claims. To the contrary, the Seventh Circuit properly balanced, as a matter of law, Feldman's interests in his particular speech at issue here with SIU's interests as a public educational institution in the business of efficiently evaluating the credentials and academic judgments of its faculty and selecting its academic personnel. Contrary to Feldman's petition, no novel principle is presented by the Seventh Circuit opinion herein.

B. Contrary to Feldman's Assertions, the Seventh Circuit Decision Created No Conflict with Any Other Circuit Court of Appeals

Feldman asserts that the Seventh Circuit opinion here creates a conflict with opinions of other circuit courts of appeals. (Pet. at 6). Feldman's assertion is dependent upon Feldman's misstatement of the Seventh Circuit decision herein, *i.e.*, that the Seventh Circuit created a *per se* rule exempting universities from First Amendment claims. (*See, text, supra* at 16-21). No such conflict exists.

To the contrary, most of the circuit court cases to which Feldman points apply the balancing of interests test to the employee's speech at issue and the employer's interests at issue in those cases, just as the Seventh Circuit applied the balancing of interests test to the parties' respective interests herein. *See, e.g., Powell v. Gallentine,* 992 F.2d 1088 (10th Cir. 1993) (employee's interest in speech regarding grade fraud balanced against employer's showing of disruption in service); *Gardetto v. Mason,* 100 F.3d 803, 815 (10th Cir. 1996) (employee's interest in speech regarding support for nonincumbent candidates for positions on college's Board of Trustees balanced against employer's interest in promoting the efficiency of its services); *Daulton v. Affeldt,* 678 F.2d 487 (4th Cir. 1982) (employee's interest in criticizing academic institution's lack of concern for issues affecting students, handling of maternity leave requests and course requirements balanced against employer's interest in avoiding disruptions in its operations); *D'Andrea v. Adams,* 626 F.2d 469 (5th Cir. 1980), *cert. denied,* 450 U.S. 919 (1981) (employee's interest in speech regarding university

finances balanced against institution's interest in preventing injury to institution); and *Stern v. Shouldice*, 706 F.2d 742 (6th Cir.), *cert. denied*, 464 U.S. 993 (1983) (professor's interest in counseling student to seek legal advice regarding student's suspension balanced against the employer's interest in promoting the efficiency of the public services it performs).[8]

Indeed, in some of the cases cited by Feldman, the courts found the balance tipped in favor of the employer, as did the Seventh Circuit here. *See, e.g., Hanton v. Gilbert*, 36 F.3d 4 (4th Cir. 1994) (employee complaints regarding new policy of charging fee for use of microscope were not on a matter of public concern and, even if they were, balance favored employer as employee's limited First Amendment interest did not require employer to tolerate

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[8] Some of the cases cited by Feldman are totally irrelevant. They do not address the application of the balancing test in any way. The only similarity is that they involve educational institutions. *See, e.g., R.C. Bunger v. University of Oklahoma Board of Regents*, 95 F.3d 987 (10th Cir. 1996) (statement held not to involve a matter of public concern; court did not apply balancing test); *Coats v. Pierre*, 890 F.2d 728 (5th Cir.), *cert. denied*, 498 U.S. 821 (1990) (speech held not to be substantial motivating factor in denial of tenure; the court did not address the balancing test); *Mumford v. Godfried*, 52 F.3d 756 (8th Cir. 1995) (court concluded employee's speech was on a matter of public concern; court did not address the balancing test); *Peacook v. Duval*, 694 F.2d 644 (9th Cir. 1982) (court concluded employee's speech involved matters of public concern; while recognizing that the University could make a balancing argument, court did not apply balancing test); and *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995) (employer denied plaintiff's termination was due to speech; court did not apply balancing test).

action it reasonably believed would disrupt the office, undermine the employer's authority and destroy close working relationships); *Jackson v. Leighton*, 168 F.3d 903 (6th Cir. 1999) (employee's interest in comments regarding merger proposals was outweighed by employer's interest in effectively leading its business); and *Jeffries v. Harleston*, 52 F.3d 9 (2nd Cir.), *cert. denied*, 516 U.S. 862 (1995) (professor's interest in a controversial off campus speech was outweighed by employer's reasonable prediction of disruption to university operations).

The Seventh Circuit decision here is consistent with numerous other decisions involving similar fact patterns. For example, in *Berg v. Hunter*, 854 F.2d 238 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989), the athletic coordinator of a university alleged that he was dismissed in retaliation for speaking out against the alleged misconduct of the university's administrators, including actions of the president of the university. The court applied the *Pickering* balance test and held that, even if the speech involved matters of public concern, the speech was not protected because the accusations were part of an ongoing personal dispute between the plaintiff and the administrator who oversaw the athletic program. The university's interest in restoring harmony within the department outweighed any interest the plaintiff had in his speech. *Id.* at 243. *See also Maples v. Martin*, 858 F.2d 1546, 1553 (11th Cir. 1988) (although speech critical of department's curriculum and other alleged inadequacies touched on matters of public concern, it was not protected because the speech impaired discipline and harmony among co-workers and interfered with the efficient operation of the department); *Mayberry v. Dees*, 663 F.2d

502, 516 n.35 (4th Cir. 1981) (to extent professor's remarks critical of the department head diminished the collegiality of the department, decision not to recommend tenure could be based on the remarks without offending the Constitution, even if remarks enjoyed First Amendment protection); *Harris v. Arizona Board of Regents*, 528 F. Supp. at 999 (plaintiff's criticism of the qualifications of a candidate fell outside the scope of public concern, but even assuming it touched on matters of public concern, the speech was not protected because it interfered with the effective operation of the department).

Contrary to Feldman's assertion, no conflict in the circuits is created by the Seventh Circuit decision herein. Therefore, no appropriate issue is presented for this Court's review.

C. Feldman Also Misstates the Basis for the Seventh Circuit's Judgment in Favor of Ho on the State Law Tortious Interference with Contract Claim; Feldman Has Stated No Issue for Review on That Claim

Feldman also misstates the basis for the Seventh Circuit's reversal of the judgment against Ho on the state tort claim. Feldman asserts that "the Court also reversed on the State Court Claim, on the ground that the absence of a Constitutional violation, under Illinois law, entitled Ho to immunity from suit." (Pet. at 4). Feldman thereby appears to suggest that a reversal of the Seventh Circuit opinion on the First Amendment claim against SIU would result in a reversal of the Seventh Circuit opinion on the state tort claim against Ho.

To the contrary, the Seventh Circuit noted that, in its earlier decision, it had already concluded Ho was entitled to immunity from the First Amendment claim against him in his individual capacity. *Feldman v. Ho*, 171 F.3d at 498 (citing *Feldman v. Bahn, supra.*) (A. at 9). The Court also concluded that it lacked jurisdiction to address Feldman's state law claim against Ho individually, which was in effect a claim against the State and barred by the Eleventh Amendment to the United States Constitution. *Id.* (A. at 8-9). Moreover, the Court noted that Ho, under Illinois law, was also entitled to immunity from suit individually regarding his employment decisions about Feldman as the head of the Mathematics Department. *Id.* (A. at 8-9). The Seventh Circuit concluded that the only possible state law claim Feldman could maintain would be for any relief available to him against the State of Illinois in the Illinois Court of Claims. *Id.* (A. at 9).

Feldman appears to suggest that the subject of this petition includes the state law tort claim against Ho. (Pet. at 2). But neither the question presented for review by Feldman, nor the substance of Feldman's petition address the Seventh Circuit's decision in favor of Ho on the state law claim. (*See*, Pet., *passim*). Therefore, no issue regarding the Seventh Circuit's opinion on the state law claim against Ho could properly be the subject of proceedings before this Court. S. Ct. Rule 14.1(a); *see also Yee v. Escondido*, 503 U.S. 519, 536 (1992).

CONCLUSION

Feldman's petition for a writ of certiorari should be denied.

Respectfully submitted,

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